

STATE OF CALIFORNIA

BOARD OF EQUALIZATION

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition)
for Redetermination and Claim for) DECISION AND RECOMMENDATION
Refund Under the Hazardous)
Substances Tax Law of:)
)
) Nos.)
)
)
)
Petitioner/Claimant)

The Appeals conference in the above-referenced matters was held by Staff Counsel Lucian Khan on in Sacramento, California.

Appearing for Petitioner/Claimant
(hereinafter "petitioner"):

Appearance waived.

Appearing for the Department
of Toxic Substances Control
(DTSC):

Dennis Mahoney
Supervising Staff Counsel

Appearing for the Special Taxes
Department, Environmental
Fees Division of the Board (STD):

Theresa Portillo
Senior Tax Auditor

Protested Items

<u>Item</u>	<u>Amount</u>
<u> </u> - Hazardous waste facility fee for the period 7/1/88-6/30/90 based on the rate for a small treatment facility.	\$
<u> </u> - Hazardous waste facility fee for the period 7/1/90-6/30/91 based on the rate for a small treatment facility.	\$

Contention

Petitioner should be classified as a mini treatment facility. It was improperly classified as a small treatment facility based on the gross weights used on the manifest, which included containers and packing materials, which are not hazardous waste.

Summary

Petitioner was issued an Interim Status Document (ISD) on September 18, 1981. The Part A permit indicates that design capacity is for small treatment.

At the treatment site, petitioner detonates explosives and other highly reactive chemicals. The quantity detonated at anytime ranges from a few grams to a few pounds. Customers are charged on the net weight of the materials sent to petitioner. The waste materials generally fall into three categories:

1. Highly reactive chemicals - are received at petitioner's facility in lab packs of one to several bottles, each containing a few grams to a few pounds of actual waste. Quite often, the manifest included the weight of the drum and related packing materials.
2. Cylinders - were brought to petitioner in overpack drums, boxes, or cylinder overpacks. The overpacks and packing materials frequently outweigh the cylinders. Many cylinders are empty or contain residual amounts of waste. After treatment, the cylinders are torch-cut and taken to a metal recycler.
3. Explosives - include initiators, detonators, squibs, pressure cartridges, and gas generators. Each contained anywhere from a few milligrams to a few grams of explosive material. After detonation, residual material is collected, inspected, and taken to a recycler.

A dispute arose when DTSC opined that the entire weight listed on the manifest should be considered hazardous waste. Petitioner was of the opinion that only the net weight of the hazardous material should be considered when calculating the total amount treated. Therefore, any packing material or containers should not be included in the calculation. If calculations are made solely on the weight of the hazardous material, petitioner would be classified as a mini treatment facility.

Prior to the conference, I received a telephone call from [redacted], vice president of petitioner. He advised he would be unable to attend the conference, but wished to send a letter stating his position. In a follow-up letter dated October 20, 1993, Mr. [redacted] proposes that any packing material not coming into direct contact with the waste be considered nonhazardous. Therefore, outside containers, overpacks, and wooden crates would be considered nonhazardous. Thus, the net weight exclusive of the packing materials should be used for the purpose of determining the facility fee. This is the actual amount of the waste handled. California regulations indicate the total quantity of waste must be entered on the manifest, but they do not state whether that is gross weight or shipping weight.

At the conference, DTSC agreed the packing material would not be hazardous, and therefore should be excluded from the calculation. The weight of the cylinders, however, should be included, since they come in direct contact with hazardous material and are also detonated. A cylinder is a container into which the hazardous material is placed.

STD recalculated the total weight figures in accordance with DTSC's opinion. Based on the information submitted in petitioner's March 5, 1992 letter addressed to DTSC, (copy in Petition file), the following highest monthly totals in each fiscal yearly period are as follows:

May 1989 -	lbs.
March 1990 -	lbs.
May 1991 -	lbs.

After the conference, Ms. Portillo contacted Mr. [redacted] by telephone and discussed the revised figures. Although he could not confirm that he agreed with the figures for the above months, he did indicate that he also recalculated the highest monthly figures for the periods under dispute, and agrees that the highest monthly figure for any fiscal year would exceed 1,000 lbs.

Analysis and Conclusions

Section 43301 of the Revenue and Taxation Code provides in pertinent part that no petition for redetermination shall be considered by the Board if the petition is based on the grounds that DTSC has improperly or erroneously classified any substance as hazardous waste. Any appeal of a classification must be made to the director of DTSC. Any dissatisfaction with the results of any such appeal is a matter for judicial review, not appeal to the Board.

Section 25205.2 of the Health and Safety Code provides that each operator of a hazardous waste facility shall pay an annual fee to the Board based on the type and size of the facility.

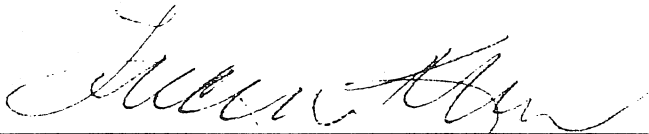
Section 25205.2(j) defines a small treatment facility as one which treats more than 0.5 tons (1,000 pounds) but less than 1,000 tons of hazardous waste during any month.

Section 25123.5 defines "treatment" as any method, technique, or process which changes or is designed to change the physical, chemical, or biological character or composition of a hazardous waste or material contained therein. It also includes the removal or reducing of harmful properties or characteristics for any purpose.

DTSC has determined that the weight calculation must include any cylinders in which the hazardous material was placed. I am therefore bound by this determination. After subtracting the weight of any outside containers and packing material, the result still shows petitioner treated in excess of 1,000 pounds in at least one month of each fiscal yearly period covered in the claim and petition. Therefore, petitioner qualifies as a small treatment facility.

Recommendation

Deny the claim and petition.



Lucian Khan, Staff Counsel

Date

JA